BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARVIN O. VIERS	)	
Claimant	)	
	)	
VS.	)	
	)	
NATIONAL COOPERATIVE REFINERY	)	
Respondent	)	Docket No. 1,021,483
	)	
AND	)	
	)	
LIBERTY MUTUAL FIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the May 2, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

ISSUES

The ALJ found that claimant suffered a re-injury to his low back through repetitive work activities. He expressly found that claimant's re-injury arose out of and in the course of employment with respondent.[1] The ALJ also found that claimant established that he provided timely notice of his ongoing injury to his leadman, Charlie Johnson, a fact that respondent did not dispute. Accordingly, the ALJ awarded claimant medical treatment and temporary total disability benefits.

The respondent requests review of these compensability issues. Specifically, respondent maintains first, that claimant failed to give proper notice to his supervisor, as required by its internal policies. And that claimant's notification to Mr. Johnson was insufficient. Respondent also contends that claimant failed to sufficiently connect his present low back complaints to his work activities. Accordingly, respondent requests the Board reverse the ALJ's preliminary hearing Order.

[1] ALJ Order (May 2, 2005).

Claimant argues the ALJ's Order should be affirmed in all respects. Claimant maintains that he provided notice of his ongoing low back complaints to his leadman Charlie Johnson. And he further maintains that his daily work activities of bending and stooping to lift as much as 100 pounds have aggravated his low back condition.

The issues to be resolved in this dispute are whether claimant has established that he sustained personal injury by accident arising out of and in the course of his employment with respondent and whether he gave timely notice of that accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board finds that the ALJ's preliminary hearing Order should be affirmed.

Distilled to its essence, claimant alleges that his ongoing work activities as a decoker for respondent have aggravated his low back condition. Claimant's job as a decoker required him to push or pull hoses weighing as much as 100 pounds at a time while removing coke (a coal like substance) from large heads which are used in the oil refining process. Claimant concedes that he suffered a low back injury to the same area of his body in 1999. He elected to use his own sick leave and personal insurance to address that problem. He returned to work with no restrictions and was able to do all that his job required for quite some time.

Over time, claimant began to notice problems in his back which came on gradually. He began to experience pain in his low back along with numbness in his leg and hip. According to claimant, it was the constant sitting and bending forward which caused his symptoms to increase.

Claimant testified that while he did not believe he told his supervisors of this problem, he did tell his leadman, Charlie Johnson on at least 10 to 12 occasions. He told Mr. Johnson how the work tasks were bothering his back.[2] Mr. Johnson is the most senior person on claimant's crew and claimant would work with him on a weekly basis.

Claimant hoped that his complaints would subside but, unfortunately, his symptoms continued to increase. On September 25, 2004, claimant was unable to go to work due to low back pain. He called in and spoke to Gene VanMeter, the shift supervisor. According to claimant, he told Mr. VanMeter that his back was hurting and he would not be able to come to work. Claimant testified that he told Mr. VanMeter that he had noticed an increase in back pain while unheading the top chamber a few days earlier and that his back had not yet recovered.[3]

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[2] P.H. Trans. at 19.

[3] *Id.* at 20.

Mr. VanMeter recalls claimant calling in that day but does not recall claimant saying that his back complaints were work-related. Mr. VanMeter testified that when he is told of an accident, he will notifies the area supervisor and Lana Cheney, the human resources representative who manages workers compensation claims and directs the employee to fill out an accident report. In this instance, Mr. VanMeter did not follow this process. According to Mr. VanMeter, he probably notified the area supervisor of claimant's absence. He did not fill out any accident report, nor did he contact Ms. Cheney. This suggests to Mr. VanMeter that there was nothing within claimant's telephone comments that indicated to him that claimant alleged he had sustained injury at work.

Claimant called in the next two days, again with the same low back complaints. He has not returned to work and was placed on some sort of sick leave plan, receiving half of his normal pay. When his sick leave was close to running out, claimant decided he should file a workers compensation claim. He contacted Ms. Cheney on December 27, 2004.

The ALJ concluded that claimant had not only established that he sustained an accidental injury arising out of and in the course of his employment with respondent but that he had satisfied the notice requirement set forth in K.S.A. 44-520.

K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or © the employee was physically unable to give such notice.

This statute does not compel an injured claimant to notify any specific person or the person specifically designated by an employer. Respondent argues that only notice to Gene VanMeter is sufficient and because Mr. VanMeter disputes claimant's recitation of their September 25, 2004 conversation, notice has not been established.

The ALJ noted that claimant testified that he gave notice to Charlie Johnson and that claimant's testimony was "not countered or challenged". The Board agrees. Mr. Johnson

was the leadman, the individual with the most seniority on the claimant's work crew. While he may not be the person that respondent has designated to receive notice, based upon the evidence as presently developed, that fact will not defeat claimant's claim. Respondent has not disputed that claimant told Charlie Johnson, the individual who oversees the crew for which claimant worked, of his ongoing work-related back complaints. The Board affirms the ALJ's finding that claimant provided timely notice.

The Board also affirms the ALJ's conclusion that claimant sustained an accidental injury arising out of and in the course of his employment with respondent. The nature of claimant's work is, by all accounts, strenuous. He uses impact wrenches, chain hoists and pressurized hoses. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[4] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[5] While it is uncontroverted that claimant sustained an earlier injury in 1999, the ALJ was persuaded that he has sustained an aggravation or re-injury of his low back condition. The Board agrees and affirms the preliminary hearing Order in all respects.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bruce E. Moore dated May 2, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2005.

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BOARD MEMBER

c: James S. Oswalt, Attorney for Claimant
Kurt W. Ratzlaff, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[4] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[5] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).